Supreme Court, U.S.
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No. 96-582

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Westboro Baptist Church, Inc.,
Petitioner,

vs.

St. David's Episcopal Church,
Respondent.

On Petition for Writ of Certiorari to the Kansas Court of Appeals

REPLY BRIEF & APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 16.5, Westboro Baptist Church submits her reply brief herein. Issues presented by Respondent's brief:

1. Whether the trial court's order is an injunction eligible for appellate review.

2. Whether review should be denied because Topeka ordinances would restrict Westboro's picketing as much as the injunction.

3. Whether the alleged use by one Westboro picketer of a graphic term describing the male homosexual act in the presence of a minor justifies the broad injunction against *picketing* of *all* Westboro picketers.

4. If Westboro's religious beliefs are incomprehensible or abhorrent to some, whether this strips her picketers of First Amendment protection.

A. The trial court's order is an injunction eligible for appellate review.

In Kansas, a party has a right of appeal from an interlocutory order that grants, continues, modifies, refuses or dissolves a preliminary injunction. K.S.A. 60-2102(a)(2). This exception recognizes an injunction creates the "possibility of drastic consequences which cannot later be corrected". *Sampson v. Murray*, 415 U.S. 88, 94 S.Ct. 937, 951, n. 58, 39 L.Ed.2d 166 (1974). If a preliminary injunction is at issue, it is subject to full appellate review.

Under Kansas law, the order is an injunction by its nature, scope and duration; and, because the trial court denied a motion to dissolve or modify, which converted the order to an injunction (if it was not already an injunction).

A temporary restraining order is of short duration, only preserves the status quo, and does not require review of evidence for its issuance. Its purpose is to freeze the status quo until evidence can be reviewed. A preliminary injunction, by

contrast, makes at least a preliminary determination of the merits, is issued after review of evidence, is long in its duration, and is broad in its scope. A preliminary injunction provides affirmative relief to the movant.

In our case, the trial court's injunction was in place for many months; it altered the status quo, stopping picketing and counter picketing which had occurred for years; provided respondent with affirmative relief; and made preliminary decisions about the merits, after receipt of evidence from both parties. Given these features, the order is an injunction, eligible for appellate review. *Burnett v. Doyen*, 220 Kan. 400, 352 P.2d 928 (1976); *Harwi v. Harwi*, 143 Kan. 710, 56 P.2d 449 (1936); *Laswell v. Seaton*, 107 Kan. 439 (1920); *City of Emporia v. Telephone Co.*, 90 Kan. 119 (1913).

Further, once the trial court heard and overruled a motion to dissolve the restraining order (in December, 1995), by operation of law it then converted to an injunction (if not before). *Transport Wkrs. U., Loc. 502 v. Tucson Air. Authr., Inc.*, 464 P.2d 367, 369-370 (Ariz.Ct.App. 1970). After Westboro appealed the injunction to the Kansas Court of Appeals, that court *sua sponte* raised the jurisdictional question, and had the parties brief the court's jurisdiction and whether it was in the interest of judicial economy to retain the appeal. After briefs were submitted, the court retained the appeal. Respondent sought no review from that ruling, and did not cross petition this Court on this issue.

B. The Topeka ordinances are not as restrictive as the injunction, and do not dispose of the issues raised here.

Respondent suggests Westboro picketers would have no practical relief if this Court reviewed and set aside the state court injunction, because two Topeka ordinances place similar restrictions on church picketing. Not so. The Topeka ordinances are under challenge on a multitude of constitutional

grounds.[1] Noting the "power" of churches,[2] the trial court entered an injunction against the 90-foot ordinance. See Appendix A hereto.[3] Only the 50-foot prohibition applies; and, that ordinance contains protective requirements (e.g., start *and*

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[1] The ordinance challenge case presents the same critical issue presented here: What is the level of privacy to be afforded the building of a house of worship? Respondent disposes of this issue with little discussion, saying the issue is of little relevance. Yet church picketing is an issue which reached the Kansas Supreme Court in *City of Prairie Village v. Hogan*, 253 Kan. 423, 855 P.2d 949 (1993), and reached national headlines when ACT UP picketed St. Patrick's Cathedral because of its position on homosexuality. One must be oblivious to current events to suggest that church picketing is not a ripe issue.

[2] The trial court said:

Thus, the place restrictions imposed by these city ordinances now before the court encroach upon First Amendment areas not definitively addressed by existing case law. Further, even those cases cited proscribing residential picketing assume the residence is not being used as the site of some meeting, assembly, or other event. In this regard, no question can exist but that churches, synagogues, or other houses of worship historically have been in the forefront and a major focal point for the dissemination of ideas on all matter of subjects effecting human conduct, expression, and advancement. Thus, an analogy to residential privacy rights would seem to ignore the historical place and power of religious institutions and forums in helping to shape general societal views and the conduct of at least not an insubstantial portion of the general citizenry. (Appendix A; emphasis in original.)

[3] During trial of this case, the lion's share of the City's evidence came from respondent's affiants. The affidavits were tested, and found wanting. Cross examination, video footage, still photographs, documents, and testimony by Westboro's picketers illustrated amply that these affidavits -- the centerpiece of respondent's position before this Court -- are mostly incomplete, unsubstantiated or untrue, and on critical issues reflect an illiteracy concerning the Scriptures and metaphors. Often the picketers' words were captured only because respondent was on the public sidewalk with a video, within feet of the picketers, video taping discussion the picketers were having among themselves. The *evidence* portrayed a remarkably different scene than the counsel-written affidavits depict. The questionable accuracy of the affidavits is forecasted in this record by Westboro's affidavit and other evidentiary submissions.

end time/duration must be posted; person must have a sign, banner or placard for ordinance to apply) the injunction does not. The injunction is considerably more restrictive than the 50-foot ordinance.

Further, there was no ordinance in place when the injunction issued. The record as it existed when the injunction issued, and the reasons therefor, is the proper scope of review here.[4]

C. The alleged use by a picketer of a term describing the male homosexual act, in the presence of a minor, does not justify the injunction.

Respondent focuses on the allegation that one of the picketers used a term which graphically describes the male homosexual act, allegedly in the presence of a minor.[5]

An open-minded, clear-headed examination of this colorful claim is helpful. Contemplate the practical implications of respondent's contention in the current social and entertainment environment. In this country, children can watch

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[4] See, e.g., *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, Syl. 1 (1983); *United States v. Mendenhall*, 446 U.S. 544, 567, 100 S.Ct. 1870, 1884, 64 L.Ed.2d 497, White, Brennan, Marshall, Stevens, JJ., dissenting (1980); *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752, Syl. 1 (1977). Respondent's brief is full of matters outside the record and for which there is zero record evidence. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 394, 109 S.Ct. 1197, 1207, 103 L.Ed.2d 412 (1989); *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 394, 108 S.Ct. 636, 644, 98 L.Ed.2d 782 (1988).

[5] The affidavit offered in support of this claim was made by respondent's counter-picketer, who admittedly involved herself in this debate; there is no evidence affiant's son ever heard the alleged statement; and the evidence reflects the alleged Westboro speaker was not present on the date provided. It is questionable that this incident occurred as described, and it was likely raised in this record to protect adults from ideas which *they* find offensive. See, e.g., *Butler v. State of Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957).

paraders simulate the act, read signs and literature (mandated in school libraries) promoting the act, endure efforts to proselytize to the act in social clubs and schools, hear sermons on the subject of wedlock and ordination of those who distinguish themselves exclusively by the act, watch sitcoms and movies glamorizing the act, and see how to commit the act on the Internet. Yet if one dares use a crude reference drawing the mind to the actual vulgarity of the act, in the context of a debate about the moral erosion brought about by, or sinfulness of, the act, he is to be silenced.

The case law does not support respondent's position. Respondent contends that this term is "indecent" and therefore can be limited, resting on this Court's opinion in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). That case was and has since been limited to its exclusive context and circumstances.[6]

Still, briefly assume *arguendo* that this graphic term can be limited, even in the context of a public religious debate

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[6] In *Pacifica* this Court said that "broadcasting has the most limited First Amendment protection" because of its "uniquely pervasive presence" and because it "extend[s] into the privacy of the home" (again note the difference between a church building and residence). This Court said George Carlin's monologue about filthy words did not contribute to literary, political or scientific value, stressing that in other contexts, "Some uses of even the most offensive words are unquestionably protected." 438 U.S. at 746, 98 S.Ct. at 3039. See also *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93, 127 (1989).

The context here is a public debate, with dialogue between two groups of people voluntarily engaged in debate, which is "expression that is at the core of First Amendment protections". *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 380, 104 S.Ct. 3106, 3117, 82 L.Ed.2d 278 (1984). And even if some of the speech is unprotected, it can not be proscribed based on its viewpoint or disagreement with the message expressed. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305, Syl. 4 (1992); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, --- U.S. ---, 115 S.Ct. 2338, 132 L.Ed.2d 487, Syl. 11 (1995). All feigned shock aside, a fair reading of the affidavits demonstrates respondent proposes removing the picketers because alleged speech of some picketers is offensive *because of its viewpoint*.

about homosexuality. Assume in America Person A can stand on a public sidewalk and say "God loves homosexuals. You are a hatemonger for saying God hates homosexuals" or words to that effect, and Person B, standing next to Person A on the same sidewalk, can be prohibited from responding by saying, "Do you realize that we are talking about buttfucking? Do you really believe that God loves such a thing as that?" or words to that effect. If this is to be the law of the land, then prohibit Person B from using the graphic term.[7] Do not remove an entire group of people engaged in lawful picketing[8], out of sight and sound, on the basis of the alleged use of a directly-

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[7] Topeka has an ordinance against the use of fighting words. Kansas has a statute against disorderly conduct, which the Kansas Supreme Court has limited to "fighting words" in cases involving words only. *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980). Scores of criminal cases have been filed in state and municipal court against the Westboro picketers under these laws, for words on signs or allegedly spoken. Two picketers were convicted, one in August, 1995 and one in May, 1996, over incidents unrelated to respondent (and which are currently on appeal). More than a hundred additional charges have been defended successfully, to dismissal or acquittal. This remedy is amply at the ready for use against any unprotected words by any individual picketer.

[8] Respondent says Westboro's picketing is not lawful due to criminal convictions of four picketers more than a year after the injunction issued over incidents unrelated to respondent or any picketing at 17th & Gage. Besides the two disorderly conduct convictions, see n. 7, two young men were convicted in August, 1995 and January, 1996. As noted in Westboro's petition, per sworn testimony, the local prosecutor campaigned to "get the picketers off the streets" and "ban Fred" (Westboro's preacher). This prosecutor put Westboro picketers on trial repeatedly during the summer, fall and winter, 1995-96, over how the picketers responded to physical attacks against them, and gained two convictions. One battery conviction was obtained because a picketer allegedly spat on a man who seriously injured picketers during an attack. The other conviction over a physical attack (described as "battery of a Lutheran minister" in respondent's brief at 4), occurred when this minister attacked the picketers with a hammer, on video, striking three of them in the process. Only one of five Westboro picketers prosecuted in the incident was convicted of anything. Those who attacked Westboro picketers were not prosecuted.

applicable-graphic term.[9]

Most important, mark the failure of this assertion to answer the central inquiry. What is the compelling government interest asserted, and is it valid and does it support the injunction?

If it is to protect children from hearing "indecent" words (however defined)[10], the *individual words* should be banned, per this Court's ruling in *Madsen*. Not an entire group of picketers who are engaged in lawful picketing. If it is to stop the use of words which may be unprotected, and may be fighting words, a remedy is already in place, see n. 7. If it is to protect the religious worship service occurring inside, it can not stand. As the state court said, respondent does not contend, nor does evidence suggest, that the worship service occurring inside was in any manner disrupted.[11]

If it is to protect some privacy interest in the church building, Westboro contends it can not stand. No such privacy interest should be afforded church buildings generally, or respondent in particular (because of waiver of that interest). If it is to protect the "worship experience" Westboro contends it can not stand. The question that must be decided is whether

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[9] Even if *arguendo*, the incident occurred as described in the affidavit; the term used in this context is "indecent"; and there is a legitimate basis for the government to prohibit or re-channel the use of this term in this context; removing all of the picketers "far exceeded that which was necessary", *Sable Communications of California, Inc. v. FCC, supra*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), and was not "appropriately tailored" to a legitimate objective, *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, --- U.S. ---, --- 116 S.Ct. 2374, 2377, 135 L.Ed.2d 888 (1996).

[10] In *Pacifica*, the Court said "indecent" means "not conforming to generally accepted standards of morality". A reference to the male homosexual act can not be called "indecent" by this standard, given what minors are exposed to daily, on television, in movies, at school, in their own conversation, and elsewhere, including specifically about homosexuality.

[11] A city ordinance prohibits the disruption of a worship service. Topeka Ordinance 54-164. This ordinance has never been applied to the Westboro picketers, because they do not disrupt religious worship services.

the government has a compelling interest in going into the minds and hearts of its citizens to protect them from a subjective, emotive reaction to disagreeable words, based merely on the desire to be free from those words, by cloaking the reaction in a garment called "the worship experience"?[12]

These issues are constitutionally critical, are squarely presented here, have never been decided, and are worthy of this Court's attention, without distraction by disagreement over Westboro's messages or methodologies.

D. Even if Westboro's religious beliefs are incomprehensible or abhorrent to some, this does not strip her picketers of First Amendment protection.

Couched in legal terms, respondent asserts that it finds Westboro's ways "incomprehensible", and hence Westboro's religious practices are not entitled to First Amendment protection.[13] E.g., respondent finds it "illogical" that Westboro could exist for so many years and remain so small and so out of

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[12] This is especially true where the protection is against *private* encroachment. The First Amendment's religious provisions preclude *government* interference with private religious activities, and limits government action of any kind relating to religion. Free exercise of religion is not protected against private infringement. *Tilton v. Richardson*, 6 F.3d 683, Syl. 7 (10th Cir. 1993). The test to determine whether the endorsement clause has been violated is whether the government has acted or expressed itself in a manner which favors any private religion. *Capitol Square Review and Advisory Board v. Pinette*, --- U.S. ---, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). The First Amendment does not *permit* government restriction of private activity.

[13] Some may say it is incomprehensible for one to rest his spiritual wellbeing in a religious organization whose founder was a mere mortal, who formed the Church of England to throw off the yoke of the Catholic church's rule against divorce and remarriage, merely because he was the King of England with the power to do so. Or in a religious organization whose priests were profiled in the December, 1996, issue of *Penthouse* with photos of homosexual orgies on the alter. Yet no one would suggest that the Episcopal Church is not entitled to the full protection of the First Amendment.

step with modern society.[14] Respondent finds it "unacceptable" that Westboro speaks of God's hate, judgment, anger and wrath.[15] Respondent finds it "inconsistent" that the Westboro picketers could present themselves as ambassadors of Christ (2 Cor. 5:20), while in the strongest language lay the ax to the root

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[14] The pattern of a small, family-oriented, local, independent, form of worship is not foreign to the Scriptures. "For where two or three are gathered together in my name, there am I in the midst of them." Matt. 18:20. When the Roman jailor was converted, Paul and Silas baptized "he and all his". Acts 16. The book of Genesis is full of stories about the patriarchs' public worship with all that pertained to their households. Noah preached as he built an ark for 120 years, warning of God's wrath and condemnation. When he boarded the ark, he was joined only by seven members of his family. Gen. 7:7.

The Scriptures make no mention of worldwide organizations with layers of hierarchy. Instead, the New Testament tells of a church made of human stones, each fitly framed, with Jesus Christ as the chief corner stone, Eph. 2:19-21; from a calling that includes not many wise, mighty, or noble, but the foolish, weak, base and despised, 1 Cor. 1:26-28; with churches in houses, 1 Cor. 16:19 and Phil. 2.

This Court can take judicial notice that in this country's history there were many small, local churches, with generations of families serving God in fear and humility. Even today, while the large churches receive more play in the media, and have more apparent influence on the beliefs and mores of society, there are hundreds of small churches, unaffiliated with any religious organization, worshipping all over America. Imagine their surprise if they learned that they were unworthy of First Amendment protection because of their small size or humble form of worship. In truth, the worship practices of Westboro's picketers are historically and theologically sound.

[15] Jonathan Edwards' *Sinners in the Hands of an Angry God*, a sermon that was required reading in all classrooms in early America (and still found in literature books), apparently sends shock waves through modern day churches. Whether popular in any quarter, passages about hell, damnation, and the wrath of God abound in the Scriptures. Old Schools Baptists, and their doctrines of reprobation, predestination, unconditional election, limited atonement, and total depravity, are well represented in American history. Against history and the plain language of the Bible, Westboro's beliefs are not "bizarre or incredible," *Hialeah*, 508 U.S. at 530, 113 S.Ct. at 2225, quoting *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834, n. 2, 109 S.Ct. 1514, 1518, n. 2, 103 L.Ed.2d 914 (1989).

of the tree (Matt. 3:10).

This Court has said that religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 2224-2226, 124 L.Ed.2d 472 (1993). It is undisputed the topic of Westboro's street ministry is religious, howsoever characterized.[16] The sincerity of their religious convictions, no matter how abhorrent to some, is unquestioned. The picketing has sustained for nearly six years, in the face of intense media vilification, multiple criminal prosecutions, scores of physical attacks, loss of employment opportunities, and other forms of contradiction.[17] Under the law, whether comprehensible by another soul, this activity is protected religious activity.

Respondent is free in this nation to adamantly disagree with the message of the Westboro picketers, and to mobilize all manner of lawful opposition. Discomfort and disagreement may never serve as the basis for depriving protected religious activity of First Amendment protection.[18]

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[16] E.g., St. David's brief describes the message as one of hate, and quarrel with the picketers' use of such words as "fag", and "sodomite". Whatever your view may be on the subjects, these are irrefutably words from, and topics addressed in, the Bible.

[17] This phenomenon is explained by the Scriptures. "And he answered and said unto them, I tell you that, if these should hold their peace, the stones would immediately cry out." Luke 19:20. See also Hebrews 11:33-40.

[18] Respondent implies Westboro's claim should fail because her pastor is an unsavory character. Mr. Phelps is a colorful, controversial civil rights lawyer of 25 years and fundamentalist, religious activist of 47 years. He is also a faithful husband of 44 years, the father of 13 children, 11 with law degrees (as well as four children-in-law), and several with further advanced degrees, all in responsible professional positions, supporting community and school programs, and contributing members of society. The merits of Mr. Phelps' life would provide hours of interesting dialogue, which has no place before this Court. He is one of 50+ picketers impacted by the injunction, none of whom lose First Amendment protection because they are unorthodox.

Respectfully submitted,
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APPENDIX

A. Temporary Restraining Order of the Shawnee County District Court in *Westboro Baptist Church, et al. v. City of Topeka, et al.*, Case No. 95-CV-1031, Enjoining Topeka Ordinance 16859.

Filed by Clerk
KS. District Court
Third Judicial District
Oct 27 4:43 PM '95
General Jurisdiction
Topeka, Kansas

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

WESTBORO BAPTIST CHURCH, INC.; FRED W. PHELPS, SR.; KARL D. HOCKENBARGER; CHARLES F. HOCKENBARGER; and TIMOTHY B. PHELPS, Plaintiffs,	)	
vs.	)	Case No. 95 CV 1031
CITY OF TOPEKA, KANSAS; JOAN HAMILTON, in Her Official Capacity as District Attorney of the State of Kansas, Third Judicial District, Defendants.	)	

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

This matter is before the court on the plaintiffs' motion for a temporary restraining order against the enforcement of city ordinances #16843, effective July 28, 1995, and #16859, effective September 20, 1995. Each deal with time and place limitation on focused picketing around events which, by the ordinances, are definitionally tied to defined religious events.

Additionally, ordinance #16859, as well, attempts to proscribed speech associated conduct within time and place restrictions defined as "demonstrating" which would constitute in legal parlance, a manner restriction on speech. Further, ordinance #16859 does not limit the situs of proscribed activities to the property and premises of a house of worship as does ordinance #16843, but proscribes activities by definition of an event including weddings and funerals without site restrictions.

The September 28, 1995, effective date ordinance, #16859, differs from the July 28, 1995, date effective ordinance by extending the place restriction for proscribed activities from 50 feet from the property line of a house of worship to 90 feet from the property line where a defined event is being held.

Although both ordinances are argued by the City as constitutional in their place distance restrictions by an analogy to specific cases involving ordinances whereby place distances restrictions on picketing have been upheld as to residences of individual citizens e.g., Frisby v. Schultz, 487 U.S. 474, 101 L.Ed. 2d 420 (1988)(limiting picketing to "before and about" to immediately in front of a residence) and City of San Jose v. Superior Court, 38 Cal. Rptr. 2d, 205, 32 Cal. App. 4th 330, cert. denied, sub nom, Thompson v. City of San Jose, 1995 WL 546172 (1995) (upholding a 300 foot proscription on picketing a residence), no case law has been proffered specifically applying such a protection of privacy to "houses of worship" or other defined "religious" events. Thus, the place restrictions imposed by these city ordinances now before the court encroach upon First Amendment areas not definitively addressed by existing case law. Further, even those cases cited proscribing residential picketing assume the residence is not being used as the site of some meeting, assembly, or other event. In this regard, no question case exist but that churches, synagogues, or other houses of worship historically have been in the forefront

and a major focal point for the dissemination of ideas on all matter of subjects effecting human conduct, expression, and advancement. Thus, any analogy to residential privacy rights would seem to ignore the historical place and power of religious institutions and forums in helping to shape general societal views and the conduct of at least not an insubstantial portion of the general citizenry.

The July 28, 1995, ordinance, by its distance enactment as a general manner and in reference to site diagrams of picketed locations, seems to merely remove focused picketers back across the street or no less than 50 feet from the property line on any side of the property where there is any entrance to a house of worship, which thereby permits a visible means of written communication by picketers with persons coming and going to a house of worship. The September 10, 1995, ordinance by reference to site diagrams in many cases prevents picketers from being across the street by virtue of its uniform 90 foot distance restriction and in some instances would either prohibit the visual message from being reasonable seen, but would also impair the focused aspect of the picketing itself either by necessary dispersal of the pickets to approaches or exits or so removing the picketers as to make the message appearing one to a general audience rather than the targeted audience.

The question raised then is what principles vis a vis the picketers First Amendment rights to relay a lawful message entitle these targeted groups to special protection from such messages which every other citizen may have the occasion to be exposed to, much more up front and close, daily anywhere in the city except perhaps at their private residences?

While the pleadings before the court and the limited testimony before the court end to identify a public need, and

have support, for a buffer zone, between those picketed and those picketing in order to promote the public peace or at least provide better evidentiary basis for the enforcement of existing laws which proscribe speech that would provoke anger in an ordinary person ("fighting words") or disturb an assembly by noisy conduct or defame a person whether by sign or verbal word, the September 20, 1995, ordinance still permits persons acting in concert with the picketers, but without holding signs, to be within 90 feet just as would be their rights under the first city ordinance or generally.

Thus, while neither ordinance proscribes this encroachment when not carrying signs, the September 20, 1995, ordinance seeks to proscribed verbal contact between picketers and those picketed by proscribing contact by those picketing with those coming to or leaving the group picketed when "addressed in a hostile or rude or loud manner". Clearly, when the law otherwise permits the physical intrusion of a person on a place, any regulation of the speech in defining the proscribed conduct must be highly deferential to both the message and the clarity of the proscription to meet First Amendment muster. Here reference to any dictionary sets a low, ambiguous, and discretionary threshold to words such as "hostile", "rude" or "loud". The First Amendment generally restricts such words not defined by reference to where they are spoken as necessitating "fighting words", words that would bring the "reasonable person", as a standard, to a desire to breach the peace or to words that are designed to instigate a riot or manner of speech that intrudes upon the use of the other's property or solitude. Otherwise, the manner or speech can not be unduly or unreasonably impeded or allowed to destroy or allowed to destroy the message of otherwise free speech. Compare, Ward v. Rock Against Racism, 491 U.S. 781, 106 L Ed. 2d 636 (1989).

Thus, as a practical matter, there is no present showing

in the record that the place of the speech, i.e., within 90 feet of a protected (religious) event, addressed to persons coming and going is, or should be, considered the constitutional equivalent of shouting "fire" in a crowded building where the shouter knows there is no fire or how those going to a protected religious event are somehow more sensitive to words spoken than any other citizen on the street whose only protection is against words that rile the average person to an urge for physical retaliation. Here, clearly the City of Topeka's existing laws protect against breach of the peace and certainly, to date, nothing would indicate any broader construction can be given to the September 20, 1996, ordinance's words "hostile", "rude" or "loud" than are already proscribed by city ordinances, yet the City here has announces an intent to dually prosecute not only the words as disorderly conduct or under other applicable city ordinances, but also under the September 20, 1995, ordinance as well, thus, doubly punishing the speaker with the only difference being the location where the words are spoken. Thus, the September 20, 1995 ordinance raises the question of whether its manner restriction is justified either by the place or the person to which the speech is addressed as well.

Thus, though certainly an ordinance of a city is entitled to a presumption of constitutionality, however where it treads on untested legal waters and must, for validity, be based on factual assumptions not evident of record, if not historically contrary, the presumption loses its force. Here is appears the best interest of all would be to reasonable maintain a status quo until all the evidence is in before exposing anyone to the wrath of the law for what may be the exercise of a constitutional freedom. The public order will be assured by enforcement of the July 28, 1995, ordinance and other immediately relevant city ordinances such as the disorderly conduct ordinance (54-121), obstruction of public ways (54-125), jostling and crowding (54-127) and the excessive noise ordinance (54-164). For this

reason, the Court will issue a temporary restraining order only against enforcement of ordinance #16859 pending resolution of the proceedings in this case unless dissolved earlier by the Court as the facts and law warrant.

ENTRY OF JUDGMENT

Judgment is entered against the City of Topeka temporarily restraining the enforcement of ordinance #16859 pending the decision on the merits in this case or until further order of the Court.

Date: October 27, 1995

/s/ Franklin R. Theis
Franklin R. Theis
District Judge